FOR ARGUMENT

Supreme Court, U.S.
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No. 01-584

IN THE

Supreme Court of the United States

WANDA ADAMS, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether and, if so, in what circumstances disparate impact claims are cognizable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34.

RULE 29.6 STATEMENT

Respondent Florida Power Corporation is a wholly-owned subsidiary of respondent Florida Progress Corporation, which is in turn a wholly-owned subsidiary of Progress Energy Corporation. Progress Energy Corporation has issued stock to the public, and the only publicly-held company owning more than 10% of its stock is State Street Bank and Trust Co.

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COUNTERSTATEMENT OF THE CASE

1. In 1992, Congress passed the Energy Policy Act of 1992, 106 Stat. 2776 (1992), opening utilities such as respondent Florida Power Corporation to increased competition. In response, Florida Power reengineered its business processes and, between 1992 and 1996, eliminated more than 1,200 positions. J.A. 32, 54-57, 64-65, 104-06. Petitioners are 117 former employees, then ranging from ages 39 to 62, who lost their jobs. Resp. App. 7a; J.A. 33-43.

2. Petitioners sued Florida Power and respondent Florida Progress Corporation for, *inter alia*, allegedly violating the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-34. The district court decertified an opt-in class that it had conditionally certified to facilitate settlement, finding that petitioners' disparate treatment claims were dissimilar, because petitioners were "terminated at different times by different decision makers based on different considerations o[r] criteria," and holding that "the disparate impact theory of liability is not applicable to ADEA claims." Pet. App. 22a-24a.

3. On interlocutory appeal, the Eleventh Circuit affirmed. Siding with five other circuits, it held that the ADEA does not allow disparate impact claims. Pet. App. 5a-8a.

The court found that the ADEA's approval of differentiations "based on reasonable factors other than age," 29 U.S.C. § 623(f)(1), "raise[s] doubts about extending the disparate impact theory of liability to ADEA cases." Pet. App. 7a. It also found that the report of the Secretary of Labor on which the ADEA is based had recommended that "factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways." *Id.* Finally, it found that the reasoning in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), is "inconsistent with the viability of a disparate impact theory of liability." Pet. App. 8a.

Judge Barkett concurred. In her view, petitioners had not stated a viable disparate impact claim. Pet. App. 9a. She otherwise would have allowed such claims. Pet. App. 9a-18a.

SUMMARY OF ARGUMENT

Consistent with traditional notions that unlawful discrimination requires actual discriminatory intent, this Court has indicated that it will extend Title VII's "disparate impact" doctrine—*i.e.*, liability based on unjustified adverse effects rather than on discriminatory intent—to other statutory contexts only where there is "convincing evidence" that Congress intended it. The ADEA contains no such evidence.

I. Section 4(a) of the ADEA applies only to employer actions taken "because of" age, a conventional reference to discriminatory intent. Moreover, by providing that an action is lawful where "based on reasonable factors other than age," Section 4(f)(1) further refers to intent and thereby confirms that a finding of discriminatory intent is required. In addition, other statutory provisions and legislative history reveal that, rather than prohibit neutral practices with adverse effects on older workers, the ADEA addresses such disadvantages through education, training, and manpower programs. Finally, disparate impact claims are incompatible with the ADEA's scheme, including its jury trial provision, opt-in procedures, and continuum of protected individuals. Indeed, because non-age factors having differential age-specific impacts are inescapable, recognition of ADEA disparate impact claims would predictably force employers to abandon valuable practices and/or make use of quotas. There is no basis for construing the ADEA to do so.

II. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its progeny do not compel recognition of disparate impact claims under the ADEA. Even under Title VII, disparate impact claims are not recognized where statutory provisions foreclose them; by making discriminatory intent essential, the ADEA forecloses disparate impact claims. Moreover, there are

substantial reasons for not carrying this Court's construction of Title VII over to the ADEA: In addition to being enacted before *Griggs*, the ADEA addresses much more limited concerns than does Title VII; in particular, the concerns that led to recognition of disparate impact claims under Title VII are absent in the ADEA. Because older workers as a class have not suffered a history of purposeful unequal treatment, shortcomings in their abilities and performance cannot be attributed to prior discrimination. Moreover, where present, discrimination against older workers is not normally motivated by deep-seated animus, but rather by generalizations about older workers' abilities to do a job. The disparate treatment doctrine fully addresses this concern about such stereotyping.

III. Contrary to petitioners' suggestion, Section 4(a) can be, and in fact is most naturally, construed to require discriminatory intent. Nor can disparate impact doctrine be inferred from Section 4(f)(1)'s "reasonable factors other than age" ("RFOA") provision. The doctrine is not needed to give meaning and effect to the RFOA provision, because that provision substantively defines an employer's rebuttal burden in "pretext" and "mixed-motive" cases, and because it clarifies that employers are permitted to use neutral criteria not directly dependent on age. Nor does it matter whether the RFOA provision is an affirmative defense (which it is not); in either event, the RFOA provision confirms that, under the ADEA, discriminatory intent is essential.

In addition, neither the legislative history nor the early interpretations of the Department of Labor ("DOL") recognize disparate impact claims. Furthermore, the interpretations later offered by the Equal Employment Opportunity Commission ("EEOC") conflict with the position of the Department of Justice ("DOJ"), are not supported by valid reasoning, and are contrary to law. Finally, no subsequent congressional enactment amends the ADEA to allow disparate impact claims.

ARGUMENT

The question presented here is whether the ADEA makes actionable "disparate impact" claims—*viz.*, claims that a facially-neutral practice is unlawful because, without regard to intent, the practice has a disproportionate adverse effect on older workers as a class and does not have a sufficiently demonstrated business justification. The ADEA's text, history, structure, and purposes demonstrate that ADEA "disparate impact" claims are not cognizable.

The essential tradition of federal anti-discrimination law—in its multiple constitutional and statutory manifestations—is to make actionable "disparate treatment" claims—*viz.*, claims that a practice is unlawful because it was adopted and applied for discriminatory purposes. *See, e.g., Akins v. Texas*, 325 U.S. 398, 403-04 (1945) (Equal Protection and Due Process); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-44 (1954) (National Labor Relations Act). Although *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its progeny have construed Title VII of the Civil Rights Act of 1964 to allow "disparate impact" claims in certain limited circumstances, this Court has otherwise declined to interpret federal anti-discrimination laws that are not explicit in this regard to provide for "disparate impact" claims. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 61-74 (1980) (Fifteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (Equal Protection Clause); *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 383-91 (1982) (42 U.S.C. § 1981); *Alexander v. Sandoval*, 121 S. Ct. 1511, 1520-23 (2001) (Title VI).

The Court's refusal to recognize a "disparate impact" doctrine of general application reflects its understanding both that "[i]t would be . . . unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces," *Watson v. Fort Worth Bank & Trust*, 487

U.S. 977, 992 (1988) (op. of O'Connor, J.), and that a general disparate impact doctrine would be "far reaching and would raise serious questions about, and perhaps invalidate, a whole range" of facially-neutral laws and common facially-neutral practices. *Washington v. Davis*, 426 U.S. at 248; *see also Watson*, 487 U.S. at 991-92. Indeed, because so many important selection practices are not subject to precise evidentiary verification, *accord id.*, the Court has expressed concern that a general disparate impact doctrine could lead employers to rely on quotas as a liability-avoidance measure. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989). Against this background, the Court has indicated that a federal anti-discrimination law will be construed to provide for disparate impact claims only where there is "convincing evidence" that Congress intended to go beyond making intentional discrimination unlawful. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 391; *see also Washington v. Davis*, 426 U.S. at 248 ("legislative prescription" necessary).

The ADEA contains no such convincing evidence. As this Court recognized in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper* holds that the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore." *Id.* at 612 (emphasis in original). While not directly resolving whether disparate impact claims are cognizable, *id.* at 610, the reasoning of *Hazen Paper* goes far to show that such claims are not cognizable. *Hazen Paper* rests on the premise that, under the ADEA, proof that a selection practice statistically correlates with age is *not* legally sufficient to establish a *prima facie* case of discrimination. *See id.* at 611 ("When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . .").

As then-Justice Rehnquist observed over 20 years ago, the statutory base for *Hazen Paper*'s reasoning and result is that a neutral practice does not differentiate "because of" age within the meaning of Section 4(a); and the "reasonable factors other than age" provision in Section 4(f)(1) confirms that Congress "did not intend the ADEA to have the restraining influence" on employers that disparate impact claims would provide. *Markham v. Geller*, 451 U.S. 945, 946-47 (1981) (Rehnquist, J., dissenting from denial of certiorari). Rather, the ADEA embodies the Secretary of Labor's conclusion, reported to Congress, that barring neutral practices with adverse effects on older workers is "futile as public policy, and even contrary to the public interest," and that such practices and their effects are better addressed through non-coercive education, training, and manpower programs. *See* Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 21-25 (1965) (J.A. 403-16). It is "inappropriate simply to transplant [the *Griggs*' Title VII disparate impact] standards . . . into [such] a different statutory scheme having a different history." *Washington v. Davis*, 426 U.S. at 255 (Stevens, J., concurring); *accord Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring).

I. DISPARATE IMPACT CLAIMS ARE NOT COGNIZABLE UNDER THE ADEA

A. The Text Of The ADEA Precludes Disparate Impact Claims

Under Section 4(a) of the ADEA, it is generally unlawful for an employer:

> (1) *to fail or refuse to hire* or *to discharge* any individual *or otherwise discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*;

> (2) *to limit, segregate, or classify* his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's age* . . . .

29 U.S.C. § 623(a) (emphasis added). "A commonsense reading of this statement strongly suggests that the statute includes a requirement of intentional discrimination." *Mullin v. Raytheon Co.*, 164 F.3d 696, 700 (1st Cir. 1999); *accord Ellis v. United States*, 73 F.3d 999, 1007 (10th Cir. 1996). While that suggestion may not be dispositive, other ADEA provisions compel this particular interpretation.

1. Section 4(a) Is Naturally Read to Prohibit Only Intentional Discrimination

On its face, Section 4(a) of the ADEA is an anti-discrimination provision, and the "concept of 'discrimination,' of course, was well known at the time of the enactment of [the ADEA], having been associated with the Fourteenth Amendment for nearly a century and carrying with it a long history of judicial construction." *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976). In that context, actionable "discrimination" is adverse action motivated by unlawful intent. *See Washington v. Davis*, 426 U.S. at 238-48; *Akins*, 325 U.S. at 403-04. Indeed, when the ADEA was passed, the "prevailing view" was that "discrimination required a purpose or motive to harm an individual because of [the protected trait]." Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 69 (1972) [hereinafter "Blumrosen, *Strangers in Paradise*"]; Arthur E. Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 N.W. U. L. Rev. 907, 955-58, 970 (1967). Against that backdrop, the Court "should not readily infer" that Section 4(a) embodies a concept of discrimination that is "something different from what the

concept of discrimination has traditionally meant." *Gen. Elec. Co.*, 429 U.S. at 145.

Far from departing from the traditional concept, Sections 4(a)(1) and 4(a)(2) provide that actions are unlawful only where taken "because of" age. Actions taken "because of" age are actions taken "by reason of" or "on account of" age, *Webster's Third New Int'l Dictionary* 194 (1976), which certainly implies intent rather than mere effect. *See Gen. Bldg. Contractors Ass'n*, 458 U.S. at 388-89 n.15. Moreover, the Court has a long history of reading prohibitions on adverse action "because of" a protected trait as prohibitions on intentional discrimination. *See, e.g., Hazen Paper*, 507 U.S. at 609 (explaining that "disparate treatment" occurs when an employer takes action "*because of* such individual's age") (emphasis in original); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (observing that a "[d]iscriminatory purpose" implies an action "selected or reaffirmed . . . *'because of,'* not merely 'in spite of,' its adverse effects upon an identifiable group") (emphasis added).

On that reading of Section 4(a), it is not enough for an ADEA plaintiff to prove that an action adversely affected older workers (or that, if the employer had considered the matter further, it could have used another practice that would have proven more advantageous for older workers). Rather, it is incumbent on the plaintiff to prove that the action was intentionally taken "because of," not merely in spite of, its adverse effects on the older worker. *See Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 141 (2000) (under the ADEA, "'liability depends on whether the protected trait . . . actually motivated the employer's decision.'") (citations omitted).

Section 4(a)(2)'s use of the language "adversely affect" does not compel a different conclusion. That language, which is part of the more extensive phrase "deprive or tend to deprive any individual of employment opportunities or

otherwise adversely affect his status as an employee," is not naturally read as establishing a standard of liability at all. It is instead most naturally read as setting forth the injuries that must result from the employment practices addressed by Section 4(a)(2). Those employment practices are ones that "limit, segregate, or classify . . . because of . . . age." Thus, under the most natural reading of Section 4(a)(2), the "because of" language is understood to indicate that unlawful intent is necessary to establish liability for an employment practice that "adversely affect[s]" an older worker. Indeed, the comma between the "adversely affect" and "because of" language makes it grammatically questionable to read the "adversely affect" phrase as part of the standard of liability. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 733 (3d Cir. 1995) (op. of Greenberg, J.); Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 842 & n.27 (1982).

This reading of Section 4(a)(2) provides a natural congruence with Section 4(a)(1). The "because of" language in Section 4(a)(1) plainly modifies the practices covered by that section (*i.e.*, "to fail or refuse to hire or to discharge . . . or otherwise discriminate . . . ."). As a matter of parallelism, the "because of" language in Section 4(a)(2) is best read as modifying the practices covered by that provision (*i.e.*, "to limit, segregate, or classify"). It follows that, if Section 4(a)(1) is limited to acts of intentional discrimination (as its use of the term "discriminate" and the language "because of" indicates), Section 4(a)(2) is so limited as well. Not only is the text of the two sections structured in parallel fashion, but it would be odd for the two subsections to adopt different theories of wrong and yet key them to the same phrase "because of."

2. The RFOA Provision Precludes Disparate Impact Claims

Any interpretive doubt about whether Section 4(a) is limited to disparate treatment claims is resolved by Section 4(f)(1). By ensuring that liability turns on intent, the latter provision forecloses disparate impact claims.

Section 4(f)(1) states in pertinent part that "[i]t shall not be unlawful . . . to take any action otherwise prohibited" by Section 4(a) "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). In its common legal usage, the term "factor" refers to motive or intent. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (op. of Brennan, J.); *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); 42 U.S.C. § 2000e-2(m). Moreover, as petitioners concede (Pet. Br. 26), the phrase "'based on' requires a principal component or foundation—a requirement that would appear to require intent where, as here, the term is combined with a reliance on 'reasonable factors.'" *Accord Webster's Third New Int'l Dictionary* 180. As the term "differentiation" plainly refers to the practices subject to possible challenge under Section 4(a), naturally and fairly read, the RFOA provision makes lawful any practice ("differentiation") founded ("based") on reasonable intentions ("factors") other than age.

Recognizing that the RFOA provision focuses on intent, the courts of appeals have long held that it confirms that an action is lawful where the employer's explanation is not a "pretext" for intentional discrimination—with the plaintiff at all times carrying the burden of persuasion. *See, e.g., Schwager v. Sun Oil Co.*, 591 F.2d 58, 61 (10th Cir. 1979) ("Once the defendant produces evidence tending to show that the termination was based on reasonable factors other than age, the plaintiff must still bear the ultimate burden of establishing his or her case of discrimination by a preponderance of the evidence."). *Accord Crimm v. Missouri Pac. R.R. Co.*, 750 F.2d 703, 712 (8th Cir. 1984); *Krieg v. Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983) (*per curiam*); *Loeb v. Textron*, 600 F.2d 1003, 1016 (1st Cir. 1979); *Bittar v. Air Canada*, 512 F.2d 582, 582-83 (5th Cir. 1975).

In this same vein, the courts of appeals have also construed the RFOA provision as providing the ADEA's answer to the so-called "mixed motives" dilemma; as Judge J. Skelly Wright wrote for the D.C. Circuit in an oft-cited decision:

> Differentiation "because of" age is unlawful, but not differentiation attributable to "reasonable factors other than age." A transgression arises only if age contributed to the employer's action—so that the differential cannot be ascribed to influences "other" than age. If age is what tips the scale in an adverse employment decision, a violation of the Act has occurred. Conversely, if reasonable and lawful factors dictate and support the employer's decision, additional consciousness of age is not itself interdicted by the Act. The courts agree that age need not be the sole factor, or even the most compelling; it simply must be a consideration that made a difference in shaping the outcome.

Cuddy v. Carmen, 694 F.2d 853, 858 n.23 (D.C Cir. 1982) (citations omitted). Notably, *Hazen Paper* similarly observed that, under the ADEA, "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." 507 U.S. at 610.

The RFOA provision's recognition that intent is outcome-determinative forecloses disparate impact claims. On the one hand, the RFOA provision "makes clear that '[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.'" *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 648 (2000) (quoting *Hazen Paper*, 507 U.S. at 611). On the other hand, the RFOA provision "insure[s] that employers [a]re permitted to use neutral criteria not directly

dependent on age." *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983). That being so, Judge Frank Easterbrook has stated that the ADEA's structure is "incomprehensible unless the prohibition [in Section 4(a)] forbids disparate treatment and the exception [in Section 4(f)(1)] authorizes disparate impact." *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting) (quotation omitted).

The RFOA provision's use of the term "reasonable" is entirely consistent with this conclusion. The term "reasonable" modifies the term "factors"—not the term "differentiation"—and, as noted above, the term "factors" is naturally understood to refer to intent; petitioners have even conceded that point. *See* Pet. Br. 26-27. Moreover, while the term "reasonable" has many usages, one accepted use is to refer to something that is "[a]ccording to reason," *Black's Law Dictionary* 1272 (7th ed. 1999), or "using or showing reason." *Webster's New World Dictionary* 1183 (2d ed. 1982).

Indeed, in equal protection law at the time of the ADEA's enactment, the term "reasonable" was used in this sense—*i.e.*, as a reference to "rational." *See, e.g., Gallagher v. Crown Kosher Super Market of Mass, Inc.*, 366 U.S. 617, 624 (1961) (a "classification having some *reasonable basis* does not offend against (the equal protection) clause") (emphasis added); *McGowan v. Maryland*, 366 U.S. 420, 428 (1961) (finding no equal protection violation because there was "no indication of the *unreasonableness* of this *differentiation*") (emphasis added); *see also Ballentine's Law Dictionary* 1057, 1060 (3d ed. 1969) (equating "reasonable basis" and "rational basis"). The Court's general "disparate treatment" cases use the term "reasonable" in this same way. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (observing that, if a plaintiff produces sufficient evidence of unlawful intent to survive a directed verdict, the defendant must offer "proof of a justification which is *reasonably related* to the achievement of some legitimate goal.") (emphasis added); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03

(1973) (employer must offer a "*reasonable* basis" for rejection of applicant) (emphasis added).

In short, the office of the term "reasonable" in the RFOA provision is to restate the anti-discrimination law's traditional requirement of a rational intention for an employer's purported non-discriminatory actions. It is not a basis for importing disparate impact claims into the ADEA. *See Loeb v. Textron*, 600 F.2d at 1012 n.6 ("The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one.").

The RFOA provision in fact has the important function of clarifying and confirming that Section 4(a) is best understood as not recognizing disparate impact claims. Legislation frequently includes clarifying provisions that are not technically necessary in order to, among other things, remove argued ambiguities, reassure skeptics, and/or constrain future interpretations by administrative agencies and courts. *See, e.g., Landgraf v. USI Film Prod.*, 511 U.S. 244, 259-62 (1994); *Massachusetts v. Morash*, 490 U.S. 107, 114 n.9 (1989); *Mackey v. Lanier Collection Agency Serv., Inc.*, 486 U.S. 825, 838-39 & n.13 (1988). This Court has even noted that insertion of "technically unnecessary" provisions "out of an abundance of caution" is "a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti canutela*)." *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 646 (1990). *Accord Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1316 (2001) (Stevens, J., dissenting); *id.* at 1322 (Souter, J., dissenting). So, in addition to substantively governing "pretext" and "mixed-motive" cases, the RFOA provision serves a perfectly proper clarifying function insofar as it "underscore[s] the necessity of determining the employer's motives . . . , an essential element in determining whether the employer violated the federal antidiscrimination

law." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995).

3. The ADEA Addresses Disproportionate Effects On Older Workers Through Non-Coercive Education, Training, And Manpower Programs

Other ADEA provisions reinforce the conclusion that the statute does not recognize disparate impact claims. Because age plays a role in employment that is complicated and nuanced, the ADEA is not a sweeping prohibition on any and all employment practices that adversely affect older workers. Rather, while it prohibits certain acts of intentional discrimination, the ADEA also expressly authorizes other explicit uses of age, permits neutral practices that may adversely affect older workers, and attempts to address consequential disadvantages that older workers may face through non-coercive education, training, and manpower programs.

Specifically, as originally enacted, while Section 4(a) barred discrimination "because of" age, the ADEA did not even apply to all individuals age 40 and over, but only to those individuals age 40 to age 65. *See* 81 Stat. 602, 607. Mandatory retirement programs were permissible, *see United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), as was age-based discrimination under the terms of a "bona fide employee benefit plan." *Ohio Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 181-82 (1989). Even now, the ADEA permits mandatory retirement for certain firefighters, executives, and policymakers, *see* 29 U.S.C. §§ 623(j), 631(c), and permits age-based provisions in early retirement plans and benefit plans, *see id.* § 623(f)(2). Moreover, intentional discrimination is permissible where age is a "bona fide occupational qualification reasonably necessary to the normal operations" of a business. *Id.* § 623(f)(1).

In addition, "[t]he statute does not constrain employers from exercising significant other prerogatives and discretions

in the course of the hiring, promoting, and discharging of their employees." *McKennon*, 513 U.S. at 361. Section 4(f)(3) makes it lawful "to discharge or otherwise discipline an individual for good cause." 29 U.S.C. § 623(f)(3). Section 4(f)(2) makes it lawful "to observe the terms of a bona fide seniority system . . . ." *Id.* § 623(f)(2). And the RFOA provision states that it shall be lawful "to take any action . . . where the differentiation is based on reasonable factors other than age." *Id.* § 623(f)(1). These "various exemptions and affirmative defenses . . . illustrat[e] . . . [that] Congress recognized that not all age discrimination in employment is 'arbitrary,'" *Betts*, 492 U.S. at 176, and, in addition, clarify that the ADEA does not prohibit neutral practices, whether or not such practices have disproportionate adverse effects on older workers.

Section 3 of the ADEA addresses practices with such disproportionate effects. Section 3 charges the Secretary of Labor with undertaking and promoting research "with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills." 29 U.S.C. § 622(a)(1). Section 3 also requires the Secretary to publish "the findings of studies and other materials for the promotion of employment" of older workers, *id.* § 622(a)(2), and to foster programs for "expanding the opportunities and potentials of older persons," *see id.* § 622(a)(3). Finally, Section 3 requires the Secretary to increase educational opportunities for older workers by "sponsor[ing] and assist[ing] State and community information and educational programs." *Id.* § 623(a)(4). Thus, while the prohibitions in Section 4 of the ADEA do not reach neutral practices with disproportionate impact, in Section 3 the statute provides a broad range of non-coercive government action aimed at the barriers to the employment of older workers.

The ADEA's findings and purposes reflect this dichotomy. Section 2 of the ADEA recognizes not only that the "setting of arbitrary age limits regardless of potential for job performance

ha[d] become a common practice," but also that "certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. § 621(a)(2). The only jurisdictional finding in the ADEA, however, is that "arbitrary discrimination in employment because of age[] burdens commerce and the free flow of goods." *Id.* § 623(a)(4). Accordingly, while Section 2(b) announces that one purpose of the ADEA is to "prohibit arbitrary age discrimination in employment," it separately states its additional purpose of "help[ing] employers and workers find ways of meeting the problems arising from the impact of age on employment." *Id.* § 621(b). In short, the ADEA's findings and stated purposes confirm that the statute addresses "arbitrary" age discrimination through its prohibitions and addresses other problems facing older workers—including the disproportionate effects of neutral practices—through education, training, and other manpower programs. *See Sutton v. United Air Lines, Inc.* 527 U.S. 471, 484 (1999) (looking to statutory findings to interpret statutory scope).

B. The Legislative History Confirms That Disparate Impact Claims Are Not Cognizable

The legislative history confirms that ADEA disparate impact claims are not cognizable. As counsel for one of petitioners' *amici* has written, "[t]he legislative history of the ADEA is a model of lucidity," and it "drives the reader to the conclusion that 'intent' to discriminate on the basis of age was the gravamen of age discrimination and that actions which have 'adverse effect' on older workers were not to be considered illegal." Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in *Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Practitioners* 73 (Monte B. Lake, ed. 1983) [hereinafter "Blumrosen, *Interpreting the ADEA: Intent or Impact*"].

In passing Title VII, Congress "did not yet have enough information to make a considered judgment about the nature of age discrimination." *EEOC v. Wyoming*, 460 U.S. at 229. It therefore directed the Secretary of Labor to study the issue and make "such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable." Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 715, 78 Stat. 265 (1964).

In his June 1965 report, the Secretary discussed "the entire range of factors which tend to have adverse effects on the employment of older workers." J.A. 360. The Secretary found that, unlike race discrimination, age discrimination is not based upon animus or other "feelings about people entirely unrelated to their ability to do the job." J.A. 355; *see also id.* ("There is *no* significant discrimination of this kind so far as older workers are concerned."). Instead, the Secretary found that "[t]he most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." J.A. 364. This form of intentional discrimination, the Secretary noted, is what Congress meant by "arbitrary discrimination." J.A. 355.

To be sure, the Secretary found that the "force of certain circumstances," such as health problems, historically lower levels of educational attainment, and technological changes, "affect older workers more strongly, as a group, than they do younger workers." J.A. 378-89. He also found that certain institutional arrangements such as pension and benefit plans could adversely affect older workers, sometimes by leading employers to refuse to hire older workers. J.A. 356, 389-97.

But the "firmest conclusion" from his study was that "the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as 'arbitrary' . . . ." J.A. 403. The

Secretary therefore recommended that arbitrary age discrimination be prohibited, J.A. 404-06, but that institutional arrangements and neutral practices disadvantaging older workers be addressed through pension reforms, J.A. 406-07, counseling, job placement, and job training programs, J.A. 407-11, and a system of continuing education, J.A. 412-16.

On January 23, 1967, the Secretary transmitted to Congress proposed legislation, entitled "Age Discrimination in Employment Act of 1967." Letter from W. Willard Wirtz to Hon. John W. McCormack and Hon. Hubert H. Humphrey, Jan. 23, 1967, *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967*, at 62-63 (1981) [hereinafter "*EEOC Legislative History*"]. The Secretary informed Congress that "[t]he prohibitions of the legislation would be directed to arbitrary discrimination . . . ." *Id.* at 62. Importantly, the Secretary noted that, while the proposed bill "provides for attention to be given to institutional arrangements which work to the disadvantage of older workers," "[r]easonable differentiations not based solely on age . . . would not fall within the proscription" of the legislation. *Id.* at 62-63. Rather, "research would be undertaken and promoted with a view to reducing barriers to the employment of older workers." *Id.* at 63.

In Senate testimony, the Secretary explained that his bill was directed only at "the 'unjust'" or "'arbitrary' . . . discrimination . . . which may be made in the absence of any legitimate relevance between age and employment capacity." *Hearings on S. 830 Before the Subcomm. on Labor of the Senate Subcomm. on Labor and Public Welfare*, 90th Cong. 37 (1967) (quotations omitted). He indicated that, where there was such "legitimate relevance," even "differentiations or distinctions" made on the basis of age were permitted. *Id.* This limitation, the Secretary explained, was "identified specifically in Section 2(b)" of the bill and "reflected particularly in Section 4(f)," which, among other things, reaffirmed that there was no violation "*where age is a bona*

fide occupational qualification" or "*where the differentiation is based on reasonable factors other than age.*" *Id.* at 39 (emphasis in original). The Secretary so testified in the House as well. *See Hearings on H.R. 3651, H.R. 3768, & H.R. 4221 Before the General Comm. on Labor of the House Comm. on Education and Labor*, 90th Cong. 8 (1967).

The Secretary's proposed bill was enacted into law. *See EEOC Legislative History* at 173. Both committee reports acknowledge that the bill reflects the Secretary's proposals. *See id.* at 74-75, 106. Moreover, the findings and purposes in Section 2 were enacted as the Secretary proposed, as were the education and research programs in Section 3, the prohibitions in Section 4(a), and the RFOA provision in Section 4(f)(1). *Compare id.* at 8 *with* 81 Stat. 602-04.

This legislative history cannot be reconciled with reading the ADEA as providing for a disparate impact doctrine. The Secretary's sweeping inquiry into "the entire range of factors tending to have adverse effects" on older workers directly encompassed neutral practices having adverse effects. But the Secretary explained that such practices were not even properly called "discrimination." J.A. 355. Moreover, the Secretary recommended that only "arbitrary" age discrimination—that is, unjustified intentional discrimination—be prohibited and that other problems facing older workers be dealt with through education, reform, and programmatic measures such as job placement and training. As Congress enacted the very language the Secretary proposed, there is no basis for inferring that Congress had a different intent. *Accord EEOC v. Wyoming*, 460 U.S. at 230-31.

C. The Disparate Impact Doctrine Is Incompatible With The ADEA

Although the text and legislative history are wholly dispositive of the question presented, there are also important structural reasons for not construing the ADEA to recognize disparate impact claims. The *Griggs* disparate impact doctrine

is immensely complicated and, in many respects, has confounded courts. *See, e.g., Watson*, 487 U.S. at 995-97 & n.3 (discussing lack of judicial consensus on, for example, the standard for determining whether a disparity is "substantial"); Michael Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition and a Recommendation for Reform*, 7 Ind. Rel. L. J. 429, 439-66 (1985) (discussing multiple problems confronting courts). These problems multiply exponentially in the context of the ADEA and show that disparate impact claims are not functionally compatible with the ADEA.

1. In Title VII cases, disparate impact claims have traditionally been tried to courts, not juries. Indeed, in 1991, when Congress authorized jury trials under Title VII, it expressly excluded disparate impact claims from that authorization. *See* 42 U.S.C. § 1981a(a)(1) & (c).

In contrast, this Court has held that ADEA claims are subject to jury trial. *See Lorillard v. Pons*, 434 U.S. 575, 585 (1978). Moreover, Section 7(c) of the ADEA was amended to provide that "a person shall be entitled to a trial by jury of any issue of fact in any such action . . . regardless of whether equitable relief is sought by any party in such action." 29 U.S.C. § 626(c)(2). Accordingly, where ADEA disparate impact claims have been allowed, those cases have been tried to juries. *See, e.g., Allen v. Entergy, Inc.*, 193 F.3d 1010, 1013-15 (8th Cir. 1999); *AFSCME, Dist. Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 354-56 (2d Cir. 1997); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 547 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985).

"[T]he very different remedial and procedural provisions under the ADEA suggest that Congress had a very different intent in mind in drafting the later law." *Lorillard*, 434 U.S. at 585 n.14. Factual questions about discriminatory intent are "typical grist for a jury's judgment." *Teamsters v. Terry*, 494

U.S. 558, 583 (1990) (op. of Stevens, J.). But the complex evaluative judgments made in disparate impact cases—about, *e.g.*, differential rates of selection, validity of selection practices, and effective alternative selection practices—plainly are not. *See* Mack A. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 U. Toledo L. Rev. 1261, 1272 (1983) [hereinafter "Player, *Title VII Transplant*"]; Douglas Herbert & Lani Shelton, *A Pragmatic Argument against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. Tex. L. Rev. 625, 652-56 (1996). Moreover, since there is a lack of consensus about applicable legal standards, "the jury instructions that they will be given will be difficult, if not impossible, to follow." *Id.* at 657.

In short, the "practical abilities and limitations of juries" could actually "impair the functioning of [a] legislative scheme" that provides for disparate impact claims. *Granfinanciera v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (quotation omitted). This strongly suggests that the ADEA does not contemplate disparate impact claims. *Cf. Price Waterhouse*, 490 U.S. at 292 (Kennedy, J., dissenting) ("most acute" potential for jury confusion is a reason not to recognize a claim).

2. Furthermore, in Title VII cases, disparate impact claims are almost always pursued as class actions under Rule 23(b)(2). Because such claims challenge practices generally applicable to all in a group and can be remedied by common equitable relief, disparate impact cases under Title VII are among the "prime examples" of cases where individualized notice and an opportunity to opt out of a class are neither necessary nor appropriate. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998).

In contrast, Rule 23(b)(2) does not apply to ADEA claims. Such claims are subject to the "opt-in" procedures established in 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b).

While these "opt-in" procedures allow age discrimination plaintiffs to group their resources and achieve economies of scale, they do not allow "representative" actions, much less ones without notice or an opportunity to opt out. *See Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170, 173-74 (1989). Thus, there is no mechanism for ensuring class-wide participation in disparate impact claims; the courts have no power to bind all affected to common equitable relief; and "repetitive" litigation imposing potentially inconsistent obligations is quite possible. Player, *Title VII Transplant* at 1272-73. These procedural differences add to the showing that the ADEA is ill-suited for, and thus is not to be reasonably construed to contemplate, disparate impact claims.

3. It is also unclear how properly to evaluate an ADEA disparate impact claim. Even acknowledging the complication of multi-racial blood lines, race, sex, national origin, and religion are basically dichotomous variables. Thus, in Title VII cases, assessing the effects of a selection practice on blacks versus non-blacks, Hispanics versus non-Hispanics, females versus males, *etc.*, is relatively straightforward.

The same is not true for ADEA cases, since "age is a continuum." *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1442 (11th Cir. 1985). While the statute covers all individuals age 40 and over, it also applies when the alleged discrimination is in favor of "substantially younger" individuals who are age 40 or over. *See O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313-14 (1996). "[I]mpact analysis that works well with finite classes like race and sex does not quite fit with a fluid, continuum concept such as age." Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That Is the Question & Some Thoughts on Impact Analysis under the Age Discrimination in Employment*

Act, 31 U. Rich. L. Rev. 819, 829 (1997) [hereinafter "Player, *Impact Analysis Under the ADEA*"].

One possible approach would allow plaintiffs to specify the applicable groupings on a case-by-case basis (*e.g.*, workers age 55 and over versus those under age 55, age 50 and over versus under age 50, *etc.*). However, such an approach is subject to gross manipulation and provides no standards to employers for self-examination and voluntary compliance. *See Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1371-73 (2d Cir. 1989); *Ellis*, 73 F.3d at 1009; Player, *Impact Analysis Under the ADEA* at 829-30. Indeed, under this view, "an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the 'subgroup' of those age 85 and above, even though all those hired were in their late seventies." *Lowe*, 886 F.2d at 1373.

A less manipulable approach compares the effects of a selection practice on individuals age 40 and over to its effects on those under age 40. *See Lowe*, 886 F.2d at 1371-73. But this more categorical approach is in tension with this Court's observation that the ADEA "prohibits discrimination on the basis of age and not class membership." *O'Connor*, 517 U.S. at 313. Thus, other courts have rejected the over age 40/under age 40 approach. *See* Philip J. Pfeifer *et al.*, *Lindeman & Grossman's Employment Discrimination Law* 367 & n.174 (3d ed. Supp. 2000) (noting cases and disagreement).

Moreover, neither of these approaches solves the problem posed by the transient nature of age. Age is not merely a continuous variable; it is also a changing one. An individual not covered by the ADEA at age 39 becomes protected by the statute the next year; and an individual under age 40 (or age 50 or age 55 or age 60) may age sufficiently to move into a different comparison group over the course of litigation. Thus, "[t]he attempt to define 'aged persons' as all persons over 40 makes sense as an effort to wipe out specific age

limits, but not as creating a 'protected class' like race or sex, precisely because of the transient composition of the group." Blumrosen, *Interpreting the ADEA: Intent or Impact* at 104.

4. For related reasons, there are also substantial questions about the legal relevance of the disproportionate effects that might be measured in an age case. Although it may be idealistic in the extreme, *see Watson*, 487 U.S. at 992 (op. of O'Connor, J.), a working assumption of Title VII law is that, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977). Based on this assumption (that interest, as well as skills and performance, are not inherently different by race, gender, or religion), the disparate impact doctrine requires a special justification for any selection practice with substantial disparate effects on otherwise similarly situated persons. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

In contrast, "statistics showing a deviation from such a 'norm' would not prove anything in the ADEA context . . . ." Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 110. It is in the nature of labor markets that those who enter or remain tend over time to be younger than those who leave. *See Laugesen v. Anaconda Corp.*, 510 F.2d 307, 312-13 n.4 (6th Cir. 1975). Moreover, as this Court has recognized, "physical ability generally declines with age." *Mass. Bd. of Retir. v. Murgia*, 427 U.S. 307, 317 (1976). In addition, because the payback period is shorter, older persons have less incentive than younger persons to invest in human capital and, accordingly, tend statistically to have more dated and less valuable technological skills and/or education. *See* Richard A. Posner, *Aging and Old Age* 51-58 (1995). Furthermore, "mental capacity sometimes diminish[es] with age." *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991); *see generally* Douglas

H. Powell, *Profiles in Cognitive Aging* 68-89 (1994). Finally, while age frequently brings with it more experience and wisdom, *see* Posner, *supra*, at 105-06, as much research confirms, in many occupations and professions, age is negatively correlated with needed skills, performance, and interest. *See, e.g., id.* at 72-78, 115-17, 358-60. Consequently, "'non-age factors having differential age-specific impacts'" are likely to be "'ubiquitous and inescapable.'" *Cunningham v. Cent. Beverage, Inc.*, 486 F. Supp. 59, 62 (N.D. Tex. 1980) (quoting Peter H. Schuck, *The Graying of Civil Rights Law: the Age Discrimination Act of 1975*, 89 Yale L.J. 27, 65 (1979)).

Indeed, as the Secretary noted in his report, J.A. 392-97, some neutral practices adversely affect older workers precisely because employers have previously treated older workers better than younger workers. For example, "virtually all elements of a standard compensation package are positively correlated with age." *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992). Thus, salary caps in payroll systems (such as those employed by federal and state governments) adversely affect the annual percentage pay increases statistically available for older workers. *See EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 743 (E.D. Pa. 1985). Moreover, in tough times, across-the-board cuts in, for example, wages and/or vacation leave have disproportionate effects on older workers. *Finnegan*, 967 F.2d at 1165. And a decision to "close a plant or curtail its operations on the basis of high wage costs" will do so as well. *Metz*, 828 F.2d at 1214 (Easterbrook, J., dissenting).

In short, in contrast to the working assumption in Title VII cases, it is to be expected that many sound and efficacious work and selection practices will have a disproportionate impact on older workers—*e.g.*, in physically demanding jobs, in jobs requiring cutting-edge computer skills, *etc.* Since such adverse effects are so predictable and yet so unavoidable, it is not appropriate to equate a showing that a facially-neutral

practice has a disparate impact on older workers with a *prima facie* case of employment discrimination and in effect "force employers to carry the burden of justifying all of their work and selection standards." Player, *Impact Analysis Under the ADEA* at 830. That many of the work and selection standards would survive scrutiny is no basis for allowing challenges to be based on so little in the first instance. *See City of Cleburne v. Cleburne Living Cent., Inc.*, 473 U.S. 432, 444 (1985). Moreover, given the costs and risks of litigation generally, allowing such challenges (especially in jury trials) would impose such burdens on employers that they would predictably be forced to either abandon sound work and selection practices—particularly those that are not subject to precise evidentiary verification—and/or overlay quotas onto those selection practices. *See Watson*, 487 U.S. at 993 (op. of O'Connor, J.); *Connecticut v. Teal*, 457 U.S. 440, 463 (1982) (Powell, J., dissenting). There is no "convincing evidence" that Congress intended such consequences from this measured legislation, much less that it intended to depart from the traditional conception of discrimination where unlawful intent is required.

II. *GRIGGS* AND ITS PROGENY UNDER TITLE VII DO NOT COMPEL RECOGNITION OF DISPARATE IMPACT CLAIMS UNDER THE ADEA

As the court below noted (Pet. App. 5a-6a), the majority of circuits to address the issue have held that disparate impact claims are not cognizable under the ADEA. As Judge Greenberg has further noted, the courts holding to the contrary have not "even purported to conduct an analysis of the issue" (*DiBiase*, 48 F.3d at 733 n.20); indeed, the seven cases cited by petitioners (Pet. Br. at 5) devote a combined total of nine sentences to it. The sole rationale offered is that *Griggs* and its progeny construe a prohibition in Title VII worded similarly to the ADEA prohibition to allow such claims. This rationale cannot withstand scrutiny.

A. Disparate Impact Claims Are Not Recognized Where Statutory Provisions Foreclose Them

In the context of Title VII, *Griggs* and its progeny do not interpret Section 703(a) as generating a generally applicable disparate impact doctrine, but rather as generating a more limited doctrine that applies where Title VII as a whole does not demonstrate that only disparate treatment claims will lie. The Court has been careful to say that disparate impact claims will lie only "in some circumstances" (*Gen. Elec. v. Gilbert*, 429 U.S. at 136-37), and only "in certain cases" (*Watson*, 487 U.S. at 986-87, 988). The Court, for example, has declined to decide whether disparate impact claims lie under Section 703(a)(1), the provision applicable to discriminatory discharge claims like those asserted by petitioners. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 144-45 (1977). Moreover, noting that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another," the Court has added that "*Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Los Angeles v. Manhart*, 435 U.S. 702, 710-11 n.20 (1978) (emphasis in original).

Of particular significance for present purposes, the Court has made it clear that, when Section 703(a) is read in light of and in conjunction with Section 703(h), no Title VII disparate impact claim will lie against a bona fide seniority system. Section 703(h) makes it lawful to "apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate . . . ." 42 U.S.C. § 2000e-2(h). This Court has held that, "[u]nder § 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved." *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 69 (1982).

Likewise, the Court has suggested that the Bennettt Amendment to Title VII, which allows wage differentiations "authorized by the provisions of section 206(d) of title 29," 42 U.S.C. § 2000e-2(h), precludes disparate impact claims for gender-correlated wage disparities. *See County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981). Similarly, the Court has held that a disparate impact claim by male employees against a gender-neutral pension plan would be barred by 29 U.S.C. § 206(d), which makes lawful compensation disparities based on "any other factor other than sex." *See Manhart*, 435 U.S. at 710-11 n.20.

Like Section 703(h) and 29 U.S.C. § 206(d) in their particular areas of application, Section 4(f)(1) of the ADEA makes discriminatory intent determinative and, in its instance, does so on a statute-wide basis. The conclusion that follows from disparate impact doctrine developed under Title VII itself is that disparate impact claims do not lie under the ADEA.

B. There Are Substantial Reasons Not To Carry *Griggs'* Title VII Construction Over To The ADEA

As a more general matter, the Court should decline to carry *Griggs'* construction of Title VII over to the ADEA. The ADEA is an entirely separate statute from Title VII, with its own text, structure, history, and purposes. The Court has not hesitated elsewhere to construe the ADEA independently and differently than Title VII. *See, e.g., EEOC v. ARAMCO*, 499 U.S. 244, 256 (1991) (ADEA but not Title VII applies outside of United States); *Lorillard*, 434 U.S. at 583-84 (ADEA but not Title VII allows jury trials). Moreover, while the Court has noted that "the prohibitions of the ADEA were derived *in haec verba* from Title VII," *e.g., id.* at 584, the Court has also declined, for example, to decide whether the *McDonnell Douglas* framework applies in ADEA cases. *See, e.g., Reeves*, 530 U.S. at 142; *O'Connor*, 517 U.S. at 311. And, in every case, the Court has examined *de novo* whether Title VII

precedent is appropriately applied to the ADEA's distinct scheme. *See, e.g., Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109-14 (1991); *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 756-58 (1979). Here, "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring).

To start, there is no basis for presuming that the 1967 Congress, by using Section 703(a)'s language in Section 4(a) of the ADEA, intended to provide for ADEA disparate impact claims. The construction of Section 703(a) as providing for disparate impact claims cannot conceivably be characterized as one that reflected "a well-known meaning at common law or in the law of this country" at the time of the ADEA's enactment. *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911). *Griggs* was not even decided until four years after the ADEA's enactment in 1967. Moreover, in 1967, the prevailing conception was that anti-discrimination provisions like ADEA required proof of discriminatory intent; indeed, scholars and petitioners' own *amici* have documented that, as of 1967, the "disparate impact" doctrine stated in *Griggs* had not yet been formulated by any court, enforcement agency, or even academic literature. *See, e.g.*, Blumrosen, *Strangers in Paradise*, at 70-71; Blumrosen, *Interpreting the ADEA: Intent or Impact* at 95; Gold, *supra*, at 518-20; Cornell AAUP Br. at 2, 22-24.

Nor is the construction of Section 703(a) in *Griggs* and its progeny determinative of Section 4(a)'s meaning. To accept this point, one need not agree with critics who have argued that "*Griggs* perverted both the language and the legislative history of the act." Richard A. Epstein, *Forbidden Grounds* 197 (1992). *See also* Nelson Lund, *The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 George Mason L. Rev. 87, 91-101 (1997); Gold, 7, *supra*, at 479 n.170. Rather, one need only accept that the language of Section 703(a), and thus of Section

4(a), can *also* be construed as only providing for intentional discrimination claims, particularly when read in light of other statutory provisions (such as Section 4(f)(1)). As explained above (*see supra* pp. 7-9), this alternative construction is plainly reasonable, and has in fact been embraced by Justices of this Court. *See Connecticut v. Teal*, 457 U.S. at 456-57 (Powell, J., joined by Chief Justice Burger, then-Justice Rehnquist, and Justice O'Connor, dissenting) ("Although this language suggests that discrimination occurs only on an individual basis, in *Griggs* . . . the Court held that discriminatory intent on the part of the employer . . . need not be shown . . . [and] that the 'disparate impact' of an employer's practices . . . can violate § 703(a)(2) of Title VII."). In other words, the construction of Section 703(a)(2) in *Griggs* and its progeny is not a necessary construction of those words wherever and whenever they appear; and, consequently, the proper construction of Section 4(a) of the ADEA, like the proper construction of any statutory provision, is to be determined by separately examining the ADEA's structure, history, purposes, and context. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

The salient point in this regard is that *Griggs* and its progeny do not purport to derive the Title VII disparate impact doctrine solely from the text of Title VII itself or, for that matter, as a necessary construction of Section 703(a)(2)'s language. Indeed, a review of the cases in fact reveals very little examination of the text at all. Rather, as courts and commentators have noted, in interpreting Section 703(a)(2) of Title VII to provide for the disparate impact doctrine, *Griggs* and its progeny "looked primarily to the larger objectives underlying Congress' enactment of Title VII." *Ellis*, 73 F.3d at 1007 n.13. *Accord DiBiase*, 48 F.3d at 733 (op. of Greenberg, J.); Michael C. Sloan, *Disparate Impact in the Age Discrimination Employment Act*, 1995 Wis. L. Rev. 507, 517 (1995).

In analogous circumstances, this Court has indicated that it will construe two similarly worded statutory texts differently if the policy objectives relied upon in construing one statute do not fully extend to the other statute. *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 522-24 (1994) (declining to extend "prevailing party" analysis of *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), to identical language in Copyright Act, 17 U.S.C. § 505, because goals of the relevant statutes were "not completely similar"). That is most emphatically the situation here.

Griggs was concerned that "childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their life." *McDonnell Douglas*, 411 U.S. at 806. Similarly, *Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977), was concerned that women, another class historically subject to invidious discrimination, could cumulatively suffer from actions based on largely immutable characteristics. But, as this Court has observed, "unlike . . . those who have been discriminated against on the basis of race or national origin," or gender, older persons as a class "have not experienced a 'history of purposeful unequal treatment,' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313; *accord Kimel*, 120 S. Ct. at 645. Moreover, where older workers (who of course were once young) are concerned, the lack of a diploma, test score, or skill "cannot be viewed as a product of lifelong discrimination." Krop, *supra*, at 850. Older workers as a class have not been educated in segregated schools, been subject to Jim Crow laws, or been barred from certain workplaces entirely. Rather, as the Secretary reported, for older workers, the issue is usually not the denial of skills or opportunity in the first instance, but rather the deterioration of skills and performance (which, as discussed above, is

generally but unevenly correlated with advancing age). *See supra* pp. 17, 24-25.

The Court has suggested that disparate impact doctrine is also concerned with the "problem of subconscious stereotypes and prejudices . . . that Title VII was enacted to combat." *Watson*, 487 U.S. at 990. But "the kind of 'we-they' thinking that fosters racial, ethnic, and sexual discrimination is unlikely to play a large role in the treatment of the elderly worker," "because the people who do the hiring and firing are generally as old as the people they hire and fire and are therefore unlikely to mistake those people's vocational abilities." Posner, *supra*, 320-21. Consistent with this observation, the Secretary reported that "age discrimination rarely was based on the sort of animus motivating some other forms of discrimination," *EEOC v. Wyoming*, 460 U.S. at 231; J.A. 355, 362-63, where prejudices having no relation to employment may cause unfair and erroneous judgments. *See Murgia*, 427 U.S. at 313. Rather, the Secretary found that age discrimination in employment results from generalizations about work abilities that may not be applicable to particular individuals. J.A. 355, 361-78. Accordingly, *Hazen Paper* determined that, "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . ." 507 U.S. at 611 (emphasis in original).

The policies motivating Title VII's disparate impact doctrine thus do not apply in the context of the ADEA's different and more limited objectives. When the *Watson* Court indicated "that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination," *Watson*, 487 U.S. at 987, it was referring to employment practices of concern to Title VII—specifically, those that perpetuate historical deprivations or that potentially allow deep-rooted animus to operate. Since older workers do not suffer from

historical deprivations or deep-rooted animus, disparate treatment doctrine fully protects their interests under the ADEA. That is the teaching of *Hazen Paper*.

The sum of the matter is that the construction of Title VII in *Griggs* and its progeny as providing for disparate impact claims is derived from, and is circumscribed by, Title VII's overall structure, history, and purposes. As such, it is not a construction that can or should govern the ADEA, whose overall structure, history, and purposes are markedly different from those of Title VII.

III. THE ARGUMENTS OF PETITIONERS AND THEIR *AMICI* FOR RECOGNIZING DISPARATE IMPACT CLAIMS ARE WITHOUT MERIT

Petitioners do little to defend the appellate cases that have carried Title VII's disparate impact doctrine over to the ADEA. Moreover, they make no effort to satisfy Title VII's requirement (*see Wards Cove Packing v. Atonio*, 490 U.S. at 656-58; 42 U.S.C. § 2000e-2(k)(i)(B)) that the specific practice causing the purported disparate impact be identified (and instead continue to assert (Pet. Br. 16, 43) a claim based on gross percentage statistics that even the concurring judge below found legally deficient). Rather, with their *amici*, petitioners advance a series of arguments that no court has adopted for recognizing ADEA disparate impact claims. These arguments are without merit.

A. Petitioners' Suggestion That Section 4(a)(2) Cannot Properly Be Construed To Have An Intent Requirement Is Unfounded

Contrary to the suggestion of the two student notes upon which petitioners rely (Pet. Br. at 13, 18), Section 4(a)(2) is easily read to provide for a discriminatory intent requirement; the section applies only to actions taken "because of" age, which is a traditional statement of an intent requirement. *See supra* p. 8. Nor does the omission of the word "discriminate"

from Section 4(a)(2) suggest otherwise. Section 4(a)(2) is merely one of many provisions in the Age *Discrimination* in Employment Act, which under traditional concepts would as a whole apply only to intentionally discriminatory acts. *See supra* pp. 7-8.

Petitioners also err in suggesting (Pet. Br. 18, 20-22) that the "adversely affect" language in Section 4(a)(2) must be read to embrace disparate impact claims so as to preserve linguistic coherence. As pointed out above (*see supra* p. 9), petitioners' construction ignores both the analogous structure of Section 4(a)(1) and the comma between the "adversely affect" and the "because of" language in Section 4(a)(2) that makes any junction between the two grammatically incorrect. *Cf. United States v. Ron Pair Enterp.*, 489 U.S. 235, 241 (1989) (holding that commas prevent junction of language in 11 U.S.C. § 506(b)). Moreover, it is petitioners' reconstruction that creates a "lack of linguistic agreement" (Pet. Br. 21) by wrongly moving the "because of" language from its proper position at the end of the provision to the beginning. While perhaps inelegant, it is linguistically proper for the "because of" language to (i) modify the employment practices at issue (*i.e.*, "to limit, segregate, or classify his employees") and yet, at the same time, (ii) apply only where a practice injures an "individual" in the statutorily specified way. Indeed, rather than reflecting a non-intent-based doctrine, the structure of Section 4(a)(2) plainly reflects its parallel to the similar provision applicable to labor organizations. *See* 29 U.S.C. § 623(c)(2) (it is "unlawful for a labor organization . . . to limit, segregate, or classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . , because of such individual's age.").

Petitioners further err in suggesting (Pet. Br. 19 n.10) that construing Sections 4(a)(1) and 4(a)(2) as both containing an intent requirement makes those provisions redundant. For example, Section 4(a)(2) adds to Section 4(a)(1) by covering

all intentionally discriminatory segregation or classification, whether or not differentiating the terms and conditions of employment, including segregation in apprenticeship and other joint union-employer programs covered by the similarly worded prohibition against union discrimination in Section 4(c)(2). Beyond that, Section 4(a)(2) is a general catch-all provision covering intentional discrimination not covered by Section 4(a)(1).

Finally, petitioners contend (Pet. Br. 24-27) that the phrase "because of" in (both) Sections 4(a)(1) and 4(a)(2) cannot be a reference to a discriminatory intent requirement, since the phrase "based on" in Section 4(f)(1)'s RFOA provision implicates an intent requirement (when combined with the "reasonable factors" language). But there is no canon of construction which suggests that two synonymous phrases in two different passages of a statute cannot have similar meanings. On the contrary, the "plain language" canon counsels that statutory words, including synonyms, be given their ordinary and, if appropriate, comparable meanings. *See, e.g., Perrin v. United States*, 444 U.S. 37, 42 (1979). Thus, the phrases "because of" and "based on reasonable factors" may both properly connote an intent requirement.

B. Disparate Impact Doctrine Is Not Necessary To Give Meaning And Effect To The RFOA Provision

Contradicting their concession (Pet. Br. 26-27) that, when combined with the phrase "reasonable factors," the phrase "based on" refers to intent, petitioners next argue (Pet. Br. 13-15, 23-29, 42-43) that the RFOA provision has meaning and effect only if unintentional conduct is actionable and the employer has the burden of proving that its conduct is legally justifiable. This argument fails at every turn.

1. Contrary to petitioners' premise (Pet. Br. 13-14, 24-25, 28), recognition of ADEA disparate impact claims is not necessary to give the RFOA provision meaning and effect. As discussed above (*see supra* pp. 10-14), the RFOA provision

substantively defines an employer's rebuttal burden in "pretext" and "mixed-motive" cases; and it also affirmatively clarifies "that employers [a]re permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33. The RFOA provision thus does not need an ADEA disparate impact doctrine to give it full meaning and effect.

2. Petitioners' RFOA argument also assumes (Pet. Br. 13, 15, 23-29, 31-34, 42-43) that the RFOA provision is an affirmative defense upon which an employer bears the burden of proof. This assumption is both irrelevant and erroneous.

a. Whether or not the RFOA provision states an affirmative defense, it confirms that the ADEA is a disparate treatment statute. The disparate impact doctrine provides for imposition of liability without a finding of discriminatory intent. By confirming that intent is outcome-determinative under the ADEA, the RFOA provision confirms that there is no room in the ADEA for disparate impact claims where intent is irrelevant. Petitioners have nothing to say on this point.

b. The RFOA is not an affirmative defense upon which the burden of proof shifts. As noted above (*see supra* pp. 10-11), the federal courts of appeals have repeatedly said that the provision does not shift the burden of proof.

Petitioners also fail to acknowledge that the RFOA provision is part of a section of "lawful employment practices," a code heading that has been statutorily enacted. *See* 104 Stat. 978. In contrast to the BFOQ provision of the ADEA (or the later added foreign workplaces provision), which sanctions an aspect of intentional age discrimination, the office of the RFOA provision is to clarify that actions based on reasonable considerations other than age are lawful. Section 4(f)(3) does much the same thing in clarifying that actions based upon good cause are lawful. In employment laws at least, such clarifying provisions are typically *not* treated as affirmative defenses that shift the burden of proof. *See, e.g., Lorance v. AT&T Tech., Inc.*, 490 U.S. 900, 908

(1989); *Steelworkers v. Weber*, 443 U.S. 193, 205-07 (1979). Indeed, in *Betts*, this Court held that even Section 4(f)(2), which allowed the express use of age in benefit plans, was definitional and did not constitute an affirmative defense. *See Betts*, 492 U.S. at 181. In this context, the RFOA provision is not properly treated as an affirmative defense either, as the lower courts have held.

Contrary to petitioners' argument (Pet. Br. 31, 32), the statutory phrase "otherwise prohibited" does not assume that "a violation has already occurred" and require that the RFOA provision be treated as an affirmative defense. The statutory phrase is "otherwise prohibited," not "prohibited." The word "otherwise" means "in other respects." *Webster's Third New Int'l Dictionary* 1598. Accordingly, the phrase "otherwise prohibited" at most means that liability may be imposed only if there is nothing else. The phrase "otherwise prohibited" does not necessarily introduce an affirmative defense, because it does not resolve whether the plaintiff or the defendant has the burden of proof on the additional considerations affecting liability.

For example, termination of a 39-year-old employee on the basis of age could be seen as "otherwise prohibited" by Section 4(a) of the ADEA, because there would be liability absent the age limit set forth in 29 U.S.C. § 631(a); but petitioners cannot seriously question that an ADEA plaintiff has the burden of proof on the threshold fact that the plaintiff is age 40 or older. Likewise, under *McDonnell Douglas* and its many progeny, once the *prima facie* case is made, the employment action could be seen as "otherwise prohibited," since a directed verdict will be entered for the plaintiff unless the defendant produces evidence of a legitimate nondiscriminatory reason for the action; nevertheless, the ultimate burden of persuasion does not shift. *See Reeves*, 530 U.S. at 142-43. Similarly, although discrimination on the basis of race is unlawful, this Court has held that such "otherwise prohibited" actions are lawful if taken pursuant to

a valid affirmative action plan; and the burden of proving the invalidity of the affirmative action plan remains with the employee-plaintiff. *See Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 626-27 (1987). In short, while there clearly are counter-examples where an action is "otherwise prohibited" unless the defendant carries a burden of persuasion on an affirmative defense (*e.g.*, a BFOQ), actions may be "otherwise prohibited" and yet leave the plaintiff with the burden of persuasion on any additional considerations affecting liability.

This understanding of the "otherwise prohibited" language is in fact confirmed by the 1990 amendments to the ADEA. As petitioners note (Pet. Br. 32-33 n.19), at that time, the "otherwise prohibited" language was also included in Section 4(f)(2) of the ADEA. But the 1990 amendments also added that the employer "shall have the burden of proving" the applicability of the amended requirements of that section. 29 U.S.C. § 623(f)(2). The enactment of this express burden of proof provision in conjunction with the "otherwise prohibited" language shows that the "otherwise prohibited" language does not by itself shift the burden of proof. Indeed, the omission of comparable express burden-shifting language in Section 4(f)(1) is another reason for inferring that the burden of proof does not shift under the RFOA provision. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983); *see also United States v. Fausto*, 484 U.S. 439, 453 (1988) ("This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.").

c. Even if the RFOA is an affirmative defense, it does not follow that the ADEA provides for disparate impact claims. The RFOA provision could be an affirmative defense for "mixed-motive" cases and, by confirming that intent is outcome-determinative, still preclude disparate impact claims.

3. Equally revealing, petitioners cannot give the RFOA provision any cognizable non-intent-based meaning. That is yet another flaw in their argument.

a. Contrary to petitioners' suggestion (Pet. Br. at 15, 42), the RFOA provision cannot properly be equated with the "business necessity" standard referred to in the EEOC's interpretive guidelines. As set forth in those guidelines (29 C.F.R. § 1625.7(d)), a "business necessity" exists only if the provisions of the Uniform Guidelines for Employee Selection are satisfied, including the provisions requiring that a challenged practice be "job related" and that no equally effective alternative practice with less adverse impact be available. *See id.* §§ 1607.3(B), 1607.6(A). There is no dictionary definition or legal precedent that even arguably allows the term "reasonable" to be given such a restrictive meaning, particularly since this Court has long held that the phrase "business necessity," as used in the case law, cannot itself properly be read so restrictively. *See, e.g., Wards Cove*, 490 U.S. at 659; *Watson*, 487 U.S. at 997-99; *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979). Moreover, the clause preceding the RFOA provision in Section 4(f)(1) expressly applies to any "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). As this Court has declared, a standard "of 'reasonable necessity[' is] not [one of] reasonableness." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419 (1985). The EEOC guidelines improperly equate these two distinct standards.

b. Also problematic is petitioners' alternative suggestion (Pet. Br. 15, 42-43) that the RFOA provision be read to embrace the rebuttal burden standard articulated in *Wards Cove*. Under that standard, a challenged practice with adverse impact is unlawful without regard to intent unless it "serves, in a significant way, the legitimate employment goals of the employer." 490 U.S. at 659. But that standard was articulated by the Court as a gloss on Section 703(a)(2) itself.

Thus, to the extent that Section 4(a)(2) is construed to embrace disparate impact claims based on this Court's construction of Section 703(a)(2), petitioners' proposed definition for the RFOA provision, based on *Wards Cove*, is already part of Section 4(a)(2)'s gloss as well. On this view, then, "the reasonable factor clause as interpreted by [petitioners] would be surplusage," *EEOC v. Newport Mesa Unified Sch. Dist.*, 893 F. Supp. 927, 932 (C.D. Cal. 1995).

c. Petitioners err in arguing (Pet. Br. 14, 29-31, 42-43) that *County of Washington v. Gunther*, 452 U.S. 161, and the "any other factor other than sex" provision of 29 U.S.C. § 206(d), require that the RFOA provision be read as setting forth a standard that is "higher" than "age-neutral and bona fide." Petitioners never tell the Court what this "higher" standard is; and *Gunther* and the "any other factor other than sex" provision in no way support construing the RFOA provision to embrace a non-intent-based standard.

While *Gunther* recognized that the Bennett Amendment's incorporation of the Equal Pay Act's fourth affirmative defense into Title VII could preclude a disparate impact claim under Title VII, it did not derive the underlying disparate impact doctrine from the claim-precluding effect of the defense. Rather, the disparate impact doctrine had already been read into the prohibitions of Title VII years earlier in *Griggs*. Nothing in *Gunther* suggests that the Bennett Amendment itself would have provided justification for reading a disparate impact doctrine into Title VII. Thus, *Gunther* does not support using the RFDA provision to read disparate impact doctrine into the ADEA.

Nor does the difference in wording between the RFOA provision and the "any other factor other than sex" provision of the Equal Pay Act provide a basis for reading a disparate impact doctrine into the ADEA (or for defining the RFOA to be a non-intent-based rebuttal standard). Petitioners offer no evidence that, in enacting the RFOA provision, the 1967

Congress looked at the Equal Pay Act or its fourth affirmative defense, much less that the word "reasonable" was used in the RFOA provision to distinguish the Equal Pay Act's fourth affirmative defense (or to otherwise create a non-intent-based standard). They also fail to mention that, in construing the "any other factor other than sex" provision, the Department of Labor in 1965 took the position that the employer must "show[] that there is a reasonable relationship between the amount of [a] differential and the weight properly attributable to the factor other than sex" (29 C.F.R. § 800.115(d) (1965))—an interpretation that leaves no substantive daylight between the Equal Pay Act's fourth affirmative defense and the RFOA provision. Yet, even under this expansive interpretation, the fourth affirmative defense is intent-based; and, by extension, the RFOA provision must be too. *See also EEOC v. J. C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988) (fourth affirmative defense requires proof that "the factor was adopted for a legitimate business reason and used reasonably and in light of the employer's stated purpose"); *Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting) (discussing circuit split on meaning of fourth affirmative defense in the Equal Pay Act).

4. In the end, petitioners' argument amounts to nothing more than this: if their debatable construction of Section 4(a) is combined with a possible negative inference from the word "reasonable" in Section 4(f)(1), strict adherence to canons of construction creates a "statutory potential" for adding the more far-reaching "disparate impact" doctrine to what is otherwise a disparate treatment statute. Pet. Br. 27. But, like all statutes, the ADEA is not "a Rubik's Cube," *J.E.M. AGSupply, Inc. v. Pioneer Hi-Bred, Int'l, Inc.*, 122 S. Ct. 593, 611 (2001) (Breyer, J., dissenting), and the Court has expressed a healthy skepticism about reading major theories of liability into statutes "through negative inferences drawn from . . . provisions of quite limited effect." *Landgraf v. USI*

Film Prod., 511 U.S. at 259. Even a touch of skeptical scrutiny calls for rejection of petitioners' argument.

Moreover, the Court has stated that "canons are not mandatory rules . . . . They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent even overcome their force." *Chickasaw Nation v. United States*, 122 S. Ct. 528, 535 (2001). Here, consistent with canons of interpretation that petitioners do not consider, the RFOA provision clarifies that discriminatory intent is outcome-determinative under the ADEA and that the ADEA is indeed limited to disparate treatment claims. No negative inference need be, or should be, drawn from the reference to "reasonable factors" other than age, particularly since the RFOA provision is much more naturally understood simply to govern substantively "pretext" or "mixed- motive" cases. Indeed, the RFOA provision does not require that the "differentiation[s]" themselves be "reasonable," only that the "factors" (*i.e.*, motives) on which they are based be reasonable; and the term "reasonable" is easily and best read to mean only that the non-age factors are rational, much as the *McDonnell Douglas* line of cases speaks of "legitimate, non-discriminatory reasons" (or the cases under 29 U.S.C. § 206(d) speak of "bona fide" "factors other than sex").

In short, there is no sound negative inference of a disparate impact theory of liability from this intent-based provision, as the statute's text, structure, purposes, and legislative history confirm. In arguing to the contrary, petitioners ask the Court to make too much from too little.

C. Petitioners' Legislative History Arguments Are Also Without Merit

Petitioners' legislative history arguments are no stronger. Contrary to petitioners' suggestion (Pet. Br. 35 n.20), the Secretary of Labor's 1965 report cannot be avoided on the ground that it was "issued seven years before *Griggs*." The

value of the report lies in the fact that its findings provide the foundation for the ADEA as enacted in 1967; the report thereby provides insight into the ADEA's proper reach. The Secretary did not need *Griggs* in order to properly report to Congress about age discrimination in employment; the Secretary studied the issue and in fact found that Title VII and race discrimination—the issues of concern in *Griggs*—were distinguishable. *See supra* p. 17.

Like their *amicus* (AARP Br. at 12-14, 19), petitioners also err in alternatively suggesting (Pet. Br. at 3) that the Secretary's report anticipated *Griggs* in calling for the elimination of neutral practices with adverse impact. While the report noted that certain employment practices (such as generous fringe benefits packages that can make older workers costly to employ) may "unintentionally *lead* to age limits in hiring," the report characterized only the age limits themselves, and not the practices leading to them, as discriminatory. J.A. 356, 392-97, 406 (emphasis added). Moreover, as counsel for one of petitioners' other *amici* has elsewhere conceded, *see* Blumrosen, *Interpreting the ADEA: Intent or Impact* at 79, the report recommended "adjust[ing] institutional arrangements disadvantaging older workers" through further legislation and other reforms, rather than through the prohibition that petitioners and *amicus* urge on this Court. J.A. 404, 406-07; *see supra* pp. 18-19.

Finally, like their *amicus* (AARP Br. at 11-14), petitioners erroneously attempt (Pet. Br. 5) to equate the report's emphasis on "arbitrary discrimination" with the "arbitrary" barriers to employment of racial minorities at issue in *Griggs*, 401 U.S. at 431. The report makes it clear that, in the context of age (as opposed to race), "arbitrary discrimination" only "involves their rejection because of assumptions about the effect of age on their ability to do a job when there is in fact no basis for these assumptions." J.A. 355 (emphasis omitted). This concern is indisputably with intentional discrimination, and not with the neutral practices at issue in *Griggs*.

D. The Interpretive Bulletins Of The DOL And The EEOC Do Not Justify Recognizing Disparate Impact Claims Under The ADEA

Petitioners next seek support from distinct interpretive bulletins issued by the DOL and the EEOC. But these interpretive bulletins do not justify judicial recognition of ADEA disparate impact claims.

1. The DOL's 1968 interpretive bulletin does not construe the ADEA to allow liability to be imposed on a disparate impact theory (and without regard to discriminatory intent). *See* App. 7a-12a. The bulletin does not even address the scope of Section 4(a) and its prohibitions, much less say that Section 4(a) extends to facially-neutral practices with a disparate impact.

Petitioners plainly err in suggesting (Pet. Br. 5, 34-35) that the bulletin's interpretation of the RFOA provision embraced disparate impact doctrine. Disparate impact is not mentioned by the bulletin. On the contrary, the bulletin states, among other things, that: "Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation" (29 C.F.R. § 860.103(b) (1970)); "[t]he clear purpose is to insure that age . . . is not a determining factor in making any decision regarding . . . employment of an individual" (*id.* § 860.103(c)); "[t]he reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept" (*id.* § 860.103(d)); and "situations in which an employee test is used . . . will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute" (*id.* § 860.104(b)). This is disparate treatment language.

To be sure, the bulletin provides a number of essentially objective guides that the DOL indicated would be recognized as supporting a "differentiation based on reasonable factors other than age . . . ." 29 C.F.R. § 860.103 (1970). But those guides do not implicitly reflect, much less expressly embrace,

a disparate impact doctrine. Rather, as might be expected in a bulletin that attempts to "provide 'a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it,'" *id.* § 860.1 (quoting *Skidmore v. Swift Co.*, 323 U.S. 134, 138 (1944)), these guides explain what an employer must do to ensure that no enforcement action is initiated by the DOL to challenge a putative "reasonable factor other than age." In other words, as this Court held in construing other provisions of the DOL's interpretive bulletin, these interpretations are "nothing more than a safe harbor, a nonexclusive objective test for employers to use in determining whether they could be certain of qualifying for the . . . exemption." *Betts*, 492 U.S. at 172.

For these reasons, commentators—including commentators relied upon by petitioners—have reported that the original DOL interpretations did *not* embrace the disparate impact doctrine. *See, e.g.*, Blumrosen, *Interpreting the ADEA: Intent or Impact* at 96; Player, *Title VII Transplant* at 1273; Evan H. Pontz, *What A Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. Rev. 267, 316 (1995); Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 Empl. Rel. L. J. 437, 449 (1985). Petitioners' contrary argument is in error.

2. As petitioners note (Pet. Br. 5-6, 36-37), the EEOC interpretations adopted in 1981 do construe the ADEA to embrace disparate impact claims. *See* 29 C.F.R. § 1625.7 (2000). But, consistent with the longstanding position of the DOJ, the Solicitor General has chosen not to defend the EEOC's interpretations. This Court should similarly decline to follow these interpretations, as they inappropriately attempt to revise the statute by administrative fiat.

a. The Court does not owe deference, in the *Chevron* sense, to the EEOC's interpretations. *Chevron* deference is

appropriate only where "the agency interpretation claiming deference was promulgated in the exercise of [congressionally delegated rulemaking] authority." *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). Here, although the EEOC has substantive rulemaking authority, *see* 29 U.S.C. § 628, it chose to issue its guidelines only as "interpretive rules or statements of policy." Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,724 (1981), App. 15a. Moreover, the EEOC did so without complying with the 30-day notice period required for the imposition of substantive rules. *Id; see also* 5 U.S.C. § 553(d). *Chevron* is accordingly inapplicable.

b. The real question is whether the Court owes the EEOC interpretations any "respect" under *Skidmore v. Swift*, the answer to which turns on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." 323 U.S. at 140. On these standards the EEOC interpretations deserve no judicial respect.

First, the EEOC interpretations are not consistent with other administrative pronouncements. Instead, they are "at sharp variance with the original interpretation" by the DOL. Blumrosen, *Interpreting the ADEA: Intent or Impact* at 102. Moreover, by seeking to require compliance with the Uniform Guidelines on Employee Selection Procedures, which were jointly issued in 1978 by the DOJ, the DOL, the EEOC, and the Civil Service Commission, the EEOC interpretations conflict with the Uniform Guidelines themselves, which specifically state that they "do not apply to responsibilities under the Age Discrimination in Employment Act." 29 C.F.R. §§ 1607.1(A), 1607.2(D). In addition, the EEOC interpretations conflict with the position that the DOJ has taken in federal court about whether disparate impact claims may be brought under the ADEA. *See, e.g.*, App. 1a-6a, reprinting Brief for Appellant, *Arnold v. Postmaster Gen.*,

Nos. 87-5361 & 87-5362, at 16-20 (D.C. Cir. March 10, 1988) ("The District Court erred as a matter of law in ruling that the disparate impact theory developed in the Title VII context is applicable to the ADEA.") (emphasis omitted).

Second, the EEOC interpretations were adopted without thorough consideration. They were proposed only months after the EEOC assumed responsibility for enforcement of the ADEA, and long before the EEOC gained any significant experience with the statute. *See* Proposed Interpretations, 44 Fed. Reg. 68,858, 68,858, 68,861 (1979), App. 13a-15a. They were then issued by an acting chairman on behalf of a commission depleted by resignations and burdened by delays in confirmation. *See* Final Interpretations, 46 Fed. Reg. at 47,726, App. 17a; Sarah Fitzgerald, *The Federal Report*, The Washington Post, October 1, 1981, at A27. More importantly, the only justification that the EEOC offered for construing the ADEA to embrace disparate impact claims was a citation to this Court's decision in *Griggs*, which of course dealt only with Title VII, and another to the Sixth Circuit's decision in *Laugesen v. Anaconda Corp.*, 510 F.2d 307, which did not even involve a disparate impact claim. *See* Final Interpretations, 46 Fed. Reg. at 47,725, App. 16a. Incredibly, the EEOC did not even mention—much less analyze—then-Justice Rehnquist's opinion in *Markham v. Geller*, 451 U.S. 945, which was issued in April 1981, several months before the guidelines were published.

Third, not only were the guidelines not thoroughly considered at the time of adoption, the EEOC has chosen to ignore important developments that have occurred since then. Among other things, while the EEOC interpretations embrace a "business necessity" standard incorporating the Uniform Guidelines as the test of "reasonable factors other than age," this Court has repeatedly rejected the restrictive requirements of those guidelines. *See supra* p. 39. In *Betts*, this Court rejected other provisions of these same interpretations as contrary to law. *See* 492 U.S. at 170-72. And in *Hazen*

Paper, in the course of rejecting the EEOC's "proxy" theory of disparate treatment, this Court made it clear that the disparate impact question is still an open one, *see* 507 U.S. at 610; Justice Kennedy wrote a concurring opinion calling into question whether Title VII's disparate impact doctrine is properly carried over to the ADEA, *see id.* at 618; and several federal courts of appeals thereafter reconsidered their own circuit precedent and held that disparate impact claims are not cognizable under ADEA, *see* Resp. Opp. at 10. Yet the EEOC has not even held a hearing on whether its 1981 interpretations should be reconsidered.

Finally, and most fundamentally, the EEOC interpretations are contrary to law. As explained above, the language, legislative history, and structure of the ADEA make discriminatory intent outcome-determinative under this statute. The EEOC's contrary interpretation cannot legally stand against the statute. *See Betts*, 492 U.S. at 171.

E. Disparate Impact Doctrine Was Not Incorporated Into The ADEA By Subsequent Congressional Action (Or Inaction)

Last, along with their *amici*, petitioners contend (Pet. Br. 5-7, 14-15, 37-40) that subsequent congressional acts—most particularly, the Older Workers Benefits Protection Act of 1990 ("OWBPA")—effectively ratified a purported pre-*Hazen Paper* administrative and judicial consensus favoring the disparate impact doctrine. This contention is unfounded.

First, there was no administrative and judicial consensus favoring ADEA disparate impact claims prior to *Hazen Paper*. As noted above, while the EEOC expressed its endorsement of disparate impact claims in 1981, the DOL did not do so during the approximately 12-year period in which it administered the ADEA; and the DOJ expressly took the opposite position in opposing such claims in litigation on behalf of federal agencies. *See supra* pp. 46-47. Moreover, no court of appeals approved such a claim until *Geller v. Markham*, 635 F.2d

1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945, and then-Justice Rehnquist instantly set down a prominent opposing marker. *See* 451 U.S. at 946-47. As petitioners have conceded (Pet. 11 n.8), that dissent prompted a substantial, continuing debate in the academic community concerning whether disparate impact claims are properly cognizable under the ADEA. And, while a number of courts may later have "applied, or assumed application of, the Title VII disparate impact model in ADEA cases" (Pet. Br. 5), they did so with little to no analysis, and with continuing judicial disagreement. *See, e.g., Metz*, 828 F.2d at 1220 (Easterbrook, J., dissenting). Against this background, there plainly was no settled understanding for Congress to ratify. *See Fogarty*, 510 U.S. at 532.

Second, disparate impact doctrine is not necessary to, or assumed by, the operation of the OWBPA. The OWBPA imposes certain requirements for a waiver to be "knowing and voluntary" and, in that regard, provides that, "if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees," the employer must provide to the potential releasee certain limited statistical information about the individuals "eligible" and "ineligible" for "such program"—*i.e.*, the waiver program. 29 U.S.C. § 626(f)(1)(H). The OWBPA does not say a word about disparate impact doctrine.

The OWBPA expresses a concern that employees may have "little or no basis to suspect that action is being taken based on their individual characteristics," S. Rep. No. 101-263, at 32 (1990), that "age may have played a role in the employer's decision," and that, before executing a waiver, an employee should at least be "aware of any potential or actual pattern of discrimination." H. Rep. 101-664, at 22-23 (1990). These concerns with the motive for the waiver program, the role that age played in it, and the existence of any pattern of discrimination from the waiver program are the subject of disparate treatment doctrine, not disparate impact doctrine.

See generally McDonnell Douglas, 411 U.S. at 805 (statistical information "may be helpful in disparate treatment cases").

Moreover, since the employer is *not* required to provide any specific statistics about the effects of the different "eligibility factors" used in the waiver program (much less statistics about, *e.g.*, the myriad practices by which employees may have been selected for termination in the first instance), the information required does not even provide a basis for evaluating a potential disparate impact claim. *See Wards Cove*, 490 U.S. at 656-58; 42 U.S.C. § 2000e-2(k)(i)(B). Indeed, since discharge claims arise under Section 4(a)(1), and since petitioners' argument in effect concedes (Pet. Br. 13, 18-19 & n.10) that disparate impact claims are not cognizable under that subsection, there would not even appear to be a tenable disparate impact claim to evaluate. *See supra* p. 27.

Finally, and in all events, neither the OWBPA nor any other amendment to the ADEA has incorporated the disparate impact doctrine into the ADEA. Petitioners do not suggest that there is statutory language expressly doing so. Moreover, to do so implicitly, Congress would have at least had to "reenact" or "amend" the substantive prohibitions of the statute. *See Lorillard*, 434 U.S. at 580. Congress has *not* done so. And other statutory revisions—even related ones—are not legally sufficient. *See, e.g., Betts*, 492 U.S. at 168.

In short, contrary to the entire premise of petitioners' argument, because Congress may legislate only through bills passed by both Houses and presented to the President, legislative ratification may not be found in the failure of Congress to disapprove the EEOC's 1981 guidelines and the few judicial decisions that accepted such claims prior to *Hazen Paper*. *See, e.g., Cent. Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 186 (1994); *Landgraf*, 511 U.S. at 263.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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CASE SCHEDULED FOR ORAL ARGUMENT ON MAY 17, 1988

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 87-5361 & 87-5362

CLYDE J. ARNOLD, JR., *et al.*,

Appellees,

v.

POSTMASTER GENERAL,

Appellant.

CHARLES R. NETHERTON, *et al.*,

Appellees,

v.

POSTMASTER GENERAL,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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* * *

ARGUMENT

I. The District Court Erred In Applying Disparate Impact Analysis In An ADEA Case

The District Court erred as a matter of law in ruling that the disparate impact theory developed in the Title VII context is applicable to the ADEA. 649 F. Supp. at 676. The Supreme Court has never approved such an extension of the effects test to age discrimination cases (*see Geller v. Markham*, 451 U.S. 945, 947-48 (1981) (Rehnquist, J., dissenting from the denial of certiorari)), and neither the language nor the purpose of the ADEA supports such an interpretation. Although several courts of appeals have applied disparate impact analysis in ADEA cases,[1] this Court has not done so and should not do so in this case.[2]

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[1] *See Holt v. The Greenwald Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Monroe v. United Air Lines, Inc.*, 736 F. 2d 394, 404 n.3 (7th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984); *Heward v. Western Electric Co.*, 35 FEP Cases 807, 810 (10th Cir. 1984); The Fifth Circuit has expressly left the question open. *Adkins v. South Central Bell Telephone Co.*, 744 F.2d 1133, 1136 (5th Cir. 1984); *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 643 n.13 (5th Cir. 1985). Decisions in the Third and Eleventh Circuits discuss disparate impact analysis in the context of ADEA actions but have not applied it. *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 372 (3rd Cir. 1987); *Allison v. Western Union*, 680 F.2d 1318, 1321-22 (11th Cir. 1982).

[2] Two ADEA decisions of this Court have made reference to disparate impact analysis. *Schmid v. Frosch*, 680 F.2d 248, 250-51 (D.C. Cir. 1982); *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). However, both cases were analyzed and decided under disparate treatment analysis, and neither addressed the question of whether disparate impact analysis should be applied under the ADEA.

Section 4(f)(1) of the ADEA provides that it "shall not be unlawful for an employer . . . to take action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).[3] A similar defense is found in the Equal Pay Act,[4] but not in Title VII. The Supreme Court has stated that the presence of this defense in the Equal Pay Act distinguishes that statute from Title VII and would preclude the application of the effects test in Equal Pay Act cases:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." . . . The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination . . . . Equal Pay Act litigation, therefore has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on bona fide use of "other factors other than sex."

Washington County v. Gunther, 452 U.S. 161, 170 (1981) (citations and footnotes omitted); *see also Los Angeles v.*

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[3] While section 4(f)(1) is not directly applicable to federal employees (*see* 29 U.S.C. § 633a(f)), this Court has nonetheless looked to it in delineating the burdens of proof in federal sector ADEA cases (*Schmid v. Frosch*, 680 F.2d 248, 250 n.7 (D.C. Cir. 1982); *Cuddy v. Carmen*, 694 F.2d 853, 858 n.23 (D.C. Cir. 1982)), and has held that the same substantive standards should be applied for establishing a violation of the ADEA in federal as in private sector cases (*Id.* at 856). Of course, it would have been very odd for Congress to have intended to curtail disparate impact analysis in private, but not federal, employment.

[4] The Equal Pay Act allows "a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1).

Manhart, 435 U.S. 702, 710-11 n.20, 713 n.24 (1978); *Geller, supra*, 451 U.S. at 949 (Rehnquist, J., dissenting).

As Judge Easterbrook argues in *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), the "reasonable factors other than age" defense in the ADEA "imp[ies] strongly that the employer may use a ground of decision that is not age, even if it varies with age . . . . 'The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact.'" *Id.* at 1220 (Easterbrook, J., dissenting) (citation omitted).[5]

Moreover, the policy considerations underlying the use of disparate impact analysis in Title VII cases are simply not present in age discrimination cases. In *Griggs v. Duke Power Company*, 401 U.S. at 424, 429-30 (1971), the seminal case for disparate impact analysis under Title VII, the Supreme Court held that Title VII was enacted "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Accordingly, facially neutral practices that "operate to 'freeze' the status quo of prior discriminatory employment practices" were deemed to be prohibited unless job related. *Id.* at 430. In reaching this conclusion, the Court emphasized the inferior, segregated educational opportunities available to blacks, as well as prior discrimination in employment. *Id.*

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[5] *Accord* Blumrosen, *Interpreting the ADEA: Intent or Impact in the Age Discrimination in Employment Act* (1982); Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & Contemp. Prob. 53 (Aut. 1986); Stacy, *A Case Against Extending the Adverse Impact Doctrine to the ADEA*, 10 Empl. Rel L.J. 437 (1985); Callile, *Three Developing Issues of the Federal Age Discrimination in Employment Act of 1967*, 54 Det. J. Urb. L. 431 (1977).

This need to avoid perpetuation of past discrimination has no applicability in the age discrimination context.[6] Unlike a facially neutral test which may have a disproportionate effect on minority applicants because of past discrimination in educational opportunities, a neutral practice which disadvantages older workers is not the product of prior discrimination against workers in the protected age group. *See* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan L. Rev. 837 (1982); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 Neb. L. Rev. 345, 353-57 (1980). Rather, older workers are confronted with a different type of bias. As Senator Javits, one of the sponsors of the Act, noted:

> [T]here is simply a wide-spread, irrationality that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs.
>
> 113 Cong. Rec. 31253 (1967).

The ADEA was enacted to protect older workers against intentional bias as a result of stereotyping them as less able to perform because of their age. Of course, the aging phenomenon permits all to attain this unique and limited protection from intentional discrimination only when the age of 40 is reached — reflecting the mutability of the characteristic encompassed by the ADEA. (DX 55A-C; A 129). Thus, in this context, the ADEA was designed to protect workers by precluding discrimination *because* they aged, not,

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[6] Then Secretary of Labor Wirtz issued a report in 1965 in response to the direction of Congress in Section 715 of the Civil Rights Act of 1964 that he conduct a study with recommendations for "legislation to prevent arbitrary discrimination in employment because of age . . . ." The report recognized at the outset the differences between age and race discrimination. "The Older American Worker: Age Discrimination In Employment" (June 1965), in Legislative History of the Age Discrimination in Employment Act (Washington: U.S. Government Printing Office, 1981), p. 2.

as in the *Griggs* context, to break down barriers to advancement of the protected group even in the absence of intentional discrimination. Accordingly, it would be "inappropriate simply to transplant [Title VII] standards in their entirety into a different statutory scheme having a different history." *See Washington v. Davis*, 426 U.S. 229, 255 (1976) (Stevens, J., concurring).

* * *

29 C.F.R. § 860 (1970):

* * *

§ 860.1 Purpose of this Part.

This part is intended to provide an interpretative bulletin on the Age Discrimination in Employment Act of 1967 like Subchapter B of this title relating to the Fair Labor Standards Act of 1938. Such interpretations of this Act are published to provide "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" (Skidmore v. Swift & Co., 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Department of Labor believes to be correct, and which will guide it in the performance of its administrative and enforcement duties under the Act unless and until it is otherwise directed by authoritative decisions of the Courts or concludes, upon reexamination of an interpretation, that it is incorrect.

[33 F.R. 9172, June 21, 1968]

* * *

§ 860.103 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age; * * *"

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the

particular facts and circumstances surrounding each individual situation.

(c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.

(d) The reasonableness of a differentiation will be determined on an individual case by case basis, not on the basis of any general or class concept, with unusual working conditions given weight according to their individual merit.

(e) Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agent or labor union which seeks to invoke it.

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age:

(1) (i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: *Provided, however,* That such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as

reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs, underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.

(iii) However, a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, whereas another individual of age 30 may be physically incapable of doing so.

(2) Evaluation factors such as quantity or quality of production, or education level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiations based on reasonable factors other than age, and do not constitute a complete or exhaustive list or limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do not have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a group is

higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor along may be used to justify a differentiation — an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

[33 F.R. 9173, June 21, 1968]

§ 860.104 Differentiations based on reasonable factors other than age — Additional examples.

(a) *Employment of Social Security recipients.* (1) It is considered discriminatory for an employer to specify that he will hire only persons receiving old age Social Security insurance benefits. Such a specification could result in discrimination against other individuals within the age group covered by the Act willing to work under the wages and other conditions of employment involved, even though those wages and conditions may be peculiarly attractive to Social Security recipients. Similarly, the specification of Social Security recipients cannot be used as a convenient reference to persons of sufficient age to be eligible for old age benefits. Thus, where two persons apply for a job, one age 56, and the other age 62 and receiving Social Security benefits, the employer may not lawfully give preference in hiring to the older individual solely because he is receiving such benefits.

(2) Where a job applicant under age 65 is unwilling to accept the number or schedule of hours required by an employer as a condition for a particular job, because he is receiving Social Security benefits and is limited in the amount of wages he may earn without losing such benefits, failure to employ him would not violate the Act. An employer's

condition as to the number of schedule of hours may be "a reasonable factor other than age" on which to base a differentiation.

(b) *Employee testing.* The use of a validated employee test is not, of itself, a violation of the Act when such test is specifically related to the requirements of the job, is fair and reasonable, is administered in good faith and without discrimination on the basis of age, and is properly evaluated. A vital factor in employee testing as it relates to the 40-65-age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test-taking than older individuals and, consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling. Therefore, situations in which an employee test is used as the sole tool or the controlling factor in the employee selection procedure will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute.

(c) *Refusal to hire relatives of current employee.* There is no provision in the Act which would prohibit an employer, employment agency, or labor organization from refusing to hire individuals within the protected age group not because of their age but because they are relatives of persons already employed by the firm or organization involved. Such a differentiation would appear to be based on "reasonable factors other than age."

[34 F.R. 322, Jan. 9, 1969, as amended at 34 F.R. 9709, June 21, 1969]

* * *

44 Fed. Reg. 68,858 (Nov. 30, 1979):

29 C.F.R. Part 1625

Proposed Interpretations; Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission

ACTION: Proposed Interpretations.

SUMMARY: On July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978) responsibility and authority for enforcement of the Age Discrimination in Employment Act of 1967, (ADEA) as amended, 29 U.S.C. 621, 623, 625, 626-633 and 634 was transferred from the Department of Labor to the Equal Employment Opportunity Commission. The Commission assumed enforcement of the ADEA on that date. The Commission proposes to adopt, except as modified herein, certain of the interpretations of the Department of Labor with respect to the enforcement of the Age Discrimination in Employment Act of 1967, as amended. The Department's interpretations currently appear at 29 CFR Part 860.

The age discrimination interpretations of the Department of Labor, issued in 1966 and amended several times thereafter, have been revised to reflect the statutory changes made in 1974 and 1978 as well as to reflect both the impact of judicial decisions and the past experience of the Department of Labor and the Commission. It is the Commission's position that these proposed interpretations be interpreted in a manner which is consistent with Title VII of the Civil Rights Act of 1964. The Commission has deleted many of the examples contained in the Department of Labor Interpretations. In some instances the deletions were made for stylistic purposes while in other instances examples were deleted because they were inconsistent with current law or because the Commission needed to accumulate expertise in certain areas.

* * *

1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * * *"

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) A factor, upon which a differentiation is based, is not a valid defense, however, if age discrimination comprises any element of the employment decision adverse to the applicant or employee, either expressly or by implication.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the ground that it is a "factor other than age," and such a practice has an adverse impact on persons in the protected age group and cannot be shown to be related to job performance, such a practice is unlawful. A vital factor in employee testing as it relates to the 40-70 age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test-taking than older individuals and consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older

applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling.

(e) The burden of proof in establishing that the differentiation was based on factors other than age is upon the employer.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the Section 4(f)(2) exception of the Act. (See also § 1625.10)

* * *

46 Fed. Reg. 47724 (Sept. 29, 1981):

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 C.F.R. Part 1625

Final Interpretations: Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Interpretations; Rescission of Interpretations.

EFFECTIVE DATE: Since the following final agency interpretations are interpretative rules or statements of policy, the 30-day delay in effective date as prescribed jurisdiction 553(d) of Title 5 U.S. Code does not apply. Accordingly, these interpretations are effective on September 29, 1981.

FOR FURTHER INFORMATION CONTACT: John Pagano, Office of the General Counsel, Legal Counsel Division, Equal Employment Opportunity Commission, 2401 E Street, NW, Room 2234, Washington, D.C. 20508, telephone 202-634-6595.

* * *

§1625.7 Differentiations based on reasonable factors other than age.

The Commission received numerous comments on this section and has decided to modify paragraphs (c), (d), and (e) of this section to clarify its position regarding the section 4(f)(1) exception of a reasonable factor other than age.

Paragraph (c) has been rewritten to illustrate that where an employment practice uses age as a limiting criterion, the defense that the practice is justified by the section 4(f)(1) exception of a reasonable factor other than age is unavailable. *See Marshall v. Goodyear Tire & Rubber Co.*, 19 EPD ¶8973 [W.D. Tenn. 1979]. Considerable confusion was generated on the proposed section from the apparent misunderstanding that, as originally written, it applied to the employer's burden of rebutting the *prima facie* case. That was incorrect. The section refers to the use of the Section 4(f)(1) defense of "a reasonable factor other then age," and has been clarified to indicate when that defense is unavailable. c.f. *City of Los Angeles, Department of Water and Power, et al. v. Manhart*, 435 U.S. 782, 712-13 (1978).

Paragraph (d) of § 1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity. *See Laugesen v. Anaconda Corp.*, 510 F.2d 307 (8th Cir. 1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The final interpretation also contains a reference to the Commission's Guidelines on Employee Selection Procedures, 29 CFR Part 1807.

Paragraph (e) of 1625.7 has been modified to clarify its initial intent that when the defense of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of

showing that the "reasonable factor other than age" exists factually. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

* * *

Signed at Washington, D.C., this 18th day of September 1981.

For the Commission,
J. Clay Smith, Jr.,
Acting Chair, Equal Opportunity Commission

* * *

UNITED STATES CODE ANNOTATED

TITLE 29. LABOR

CHAPTER 14--AGE DISCRIMINATION IN EMPLOYMENT

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the

general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures--

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably

necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title,

because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the

actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in

favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection--

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained--

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of--

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section--

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because--

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for--

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age--

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which

the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii); are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that--

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)--

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is

at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i)If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The

relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if--

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a

benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include--

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an

interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power--

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures

provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a

violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program

offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver

may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ 630. Definitions

For the purposes of this chapter--

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations,

business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its

members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or

political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2- year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of

such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

§ 632. Annual report to Congress

The Equal Employment Opportunity Commission shall submit annually in January a report to the Congress covering its activities for the preceding year and including such information, data and recommendations for further legislation in connection with the matters covered by this chapter as it may find advisable. Such report shall contain an evaluation and appraisal by the Commission of the effect of the minimum and maximum ages established by this chapter, together with its recommendations to the Congress. In making such evaluation and appraisal, the Commission shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as it may deem pertinent.

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except

that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units

of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons

named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.